

Part III – Administrative, Procedural, and Miscellaneous

Modification of Notice 2005-4; biodiesel and aviation-grade kerosene

Notice 2005-62

Section 1. PURPOSE

This notice modifies Notice 2005-4, 2005-2 I.R.B. 289, as modified by Notice 2005-24, 2005-12 I.R.B. 757, by revising the guidance relating to the Certificate for Biodiesel, which is required as a condition for claiming a credit or payment under §§ 6426(c), 6427(e), and 40A of the Internal Revenue Code. This notice also provides guidance on issues related to the biodiesel credit or payment that are not addressed in Notice 2005-4. This notice further modifies Notice 2005-4 relating to the Certificate of Person Buying Aviation-Grade Kerosene for Commercial Aviation or Nontaxable Use, which is required to notify a position holder of certain transactions under §§ 4081 and 4082.

Notice 2005-4 provides guidance on certain excise tax provisions in the Code that were added or affected by the American Jobs Creation Act of 2004 (Pub. L. 108-357) (the Act).

Section 2. BIODIESEL CERTIFICATE

(a) Section 2 of Notice 2005-4 provides guidance on credits and payments allowed for biodiesel fuel. Section 2(h) of that notice describes the Certificate for Biodiesel that, under the Code, the claimant must obtain “from” the producer of the biodiesel. This notice revises the certificate to clarify that the claimant may obtain the certificate either directly from the producer of the biodiesel or indirectly from a biodiesel reseller.

(b) Section 2(h) of Notice 2005-4 also requires that each claim contain a statement that the claimant has in its possession an unexpired biodiesel certificate. This notice revises that rule so that the claimant generally must submit a copy of the certificate with its claim.

(c) This notice also provides guidance on accounting for commingled biodiesel.

(d) Finally, this notice provides a transitional rule for claims that were made before August 29, 2005.

(e) Accordingly, section 2(h) of Notice 2005-4 is revised to read as follows:

Section 2. ALCOHOL AND BIODIESEL CLAIMS

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(h) Content of claim; commingled biodiesel--(1) In general. Section 6426(c)(4) of the Code provides that the biodiesel mixture credit of § 6426 is not allowed unless the producer of the mixture obtains a certificate, in such form and manner as may be prescribed by the Secretary, from the producer of the biodiesel that identifies the product produced and the percentage of biodiesel and agri-biodiesel in the product.

Section 40A(b)(4) provides a similar rule for the biodiesel mixture credit and biodiesel credit allowed by § 40A. Under this notice, these rules will also apply to the credit or payment allowed for biodiesel mixtures by § 6427(e). Accordingly, each claim for a credit or payment under § 6426, 6427(e), or 40A, must contain the following information with respect to biodiesel or a biodiesel mixture covered by the claim:

(i) The amount of agri-biodiesel and the amount of biodiesel other than agri-biodiesel in the biodiesel or biodiesel mixture.

(ii) A copy of the Certificate for Biodiesel described in paragraph (h)(2) of this section and, if applicable, the Statement(s) of Biodiesel Reseller described in paragraph (h)(3) of this section. However, in the case of a certificate and statement that supports a claim made on more than one claim form, the certificate and statement are to be included with the first claim and the claimant is to provide information related to the certificate on any subsequent claim in accordance with the instructions applicable to the claim form.

(iii) A statement by the claimant that the claimant has no reason to believe that any information in the certificate (described in paragraph (h)(2) of this section) or statement (described in paragraph (h)(3) of this section) is false.

(2) Certificate for Biodiesel--(i) In general. The certificate to be obtained by the claimant claiming a credit or payment under § 6426, 6427(e), or 40A consists of a statement that is signed under penalties of perjury by a person with authority to bind the biodiesel producer, is substantially in the same form as the model certificate in paragraph (h)(2)(ii) of this section, and contains all the information necessary to

complete such model certificate. In the case of a claimant that is the producer of the biodiesel, the information required on lines 2-7 of the model certificate is not applicable and those lines do not need to be completed. The certificate identification number is determined by the producer and must be unique to each certificate. A biodiesel producer may, with respect to a particular sale of biodiesel, provide multiple separate certificates, each applicable to a portion of the total volume of biodiesel sold. Thus, for example, a biodiesel producer that sells 5,000 gallons of biodiesel may provide its buyer with five certificates for 1,000 gallons each. The multiple certificates may be provided either to the buyer at or after the time of sale or to a reseller in the circumstances described in paragraph (h)(3)(i) of this section.

(ii) Model certificate.

CERTIFICATE FOR BIODIESEL

Certificate Identification Number: _____

(To support a claim related to biodiesel or a biodiesel mixture under the Internal Revenue Code)

The undersigned biodiesel producer ("Producer") hereby certifies the following under penalties of perjury:

1. _____

Producer's name, address, and employer identification number

2. _____

Name, address, and employer identification number of person buying the biodiesel from Producer

3. _____

Date and location of sale to buyer

4. This certificate applies to _____ gallons of biodiesel.

5. Producer certifies that the biodiesel to which this certificate relates is:

_____ % Agri-biodiesel (derived solely from virgin oils)

_____ % Biodiesel other than agri-biodiesel

This certificate applies to the following sale:

_____ Invoice or delivery ticket number

_____ Total number of gallons of biodiesel sold under that invoice or delivery ticket number (including biodiesel not covered by this certificate)

_____ Total number of certificates issued for that invoice or delivery ticket number

6. _____

Name, address, and employer identification number of reseller to whom certificate is issued (only in the case of certificates reissued to a reseller after the return of the original certificate)

7. _____ Original Certificate Identification Number (only in the case of certificates reissued to a reseller after return of the original certificate)

Producer is registered as a biodiesel producer with registration number _____.
Producer's registration has not been suspended or revoked by the Internal Revenue Service.

Producer certifies that the biodiesel to which this certificate relates is monoalkyl esters of long chain fatty acids derived from plant or animal matter that meets the requirements of the American Society of Testing and Materials D6751 and the registration requirements for fuels and fuel additives established by EPA under section 211 of the Clean Air Act (42 U.S.C. 7545).

Producer understands that the fraudulent use of this certificate may subject Producer and all parties making any fraudulent use of this certificate to a fine or imprisonment, or both, together with the costs of prosecution.

Printed or typed name of person signing this certificate

Title of person signing

Signature and date signed

(3) Statement of Biodiesel Reseller--(i) In general. A person that receives a Certificate for Biodiesel, and subsequently sells the biodiesel without producing a biodiesel mixture or claiming the biodiesel credit, is to give the certificate and a statement that satisfies the requirements of this paragraph (h)(3) to its buyer. The statement must contain all of the information necessary to complete the model certificate in paragraph (h)(3)(iii) of this section and be attached to the Certificate for

Biodiesel. A reseller cannot make multiple copies of a Certificate for Biodiesel to divide the certificate between multiple buyers. If a single Certificate for Biodiesel applies to biodiesel that a reseller expects to sell to multiple buyers, the reseller should return the certificate (together with any statements provided by intervening resellers) to the producer who may reissue to the reseller multiple Certificates for Biodiesel in the appropriate volumes. The reissued certificates must include the Certificate Identification Number from the certificate that has been returned.

(ii) Withdrawal of the right to provide a certificate. The Internal Revenue Service may withdraw the right of a buyer of biodiesel to provide the certificate and a statement under this section if the Internal Revenue Service cannot verify the accuracy of the buyer's statements. The Internal Revenue Service may notify any person to whom the buyer has provided a statement that the buyer's right to provide the certificate and a statement has been withdrawn.

(iii) Model statement of biodiesel reseller.

STATEMENT OF BIODIESEL RESELLER

(To support a claim related to biodiesel or a biodiesel mixture under the Internal Revenue Code)

The undersigned biodiesel reseller ("Reseller") hereby certifies the following under penalties of perjury:

1. _____

Reseller's name, address, and employer identification number

2. _____

Name, address, and employer identification number of Reseller's buyer

3. _____
Date and location of sale to buyer

4. _____
Volume of biodiesel sold

5. _____
Certificate Identification Number on the Certificate for Biodiesel

Reseller has bought the biodiesel described in the accompanying Certificate for Biodiesel and Reseller has no reason to believe that any information in the certificate is false.

Reseller has not been notified by the Internal Revenue Service that its right to provide a certificate and a statement has been withdrawn.

Reseller understands that the fraudulent use of this statement may subject Reseller and all parties making any fraudulent use of this statement to a fine or imprisonment, or both, together with the costs of prosecution.

Printed or typed name of person signing this certificate

Title of person signing

Signature and date signed

(4) Commingled biodiesel--(i) In general. For purposes of this paragraph (h)(4), commingled biodiesel means--

(A) Biodiesel held by its producer in a storage tank that is used to store both agri-biodiesel and biodiesel other than agri-biodiesel; and

(B) Biodiesel held by a person other than its producer in a storage tank unless a single Certificate for Biodiesel applies to the tank.

(ii) Reasonable methods may be used to identify commingled biodiesel. A person that holds commingled biodiesel may identify the biodiesel it sells or uses by any reasonable method, including a first-in, first-out method applied either on a tank-by-tank basis or on an aggregate basis to all commingled biodiesel the person holds. Thus, for example, a reseller may treat the biodiesel it first purchases as the first biodiesel it resells, and a biodiesel mixture producer may treat the biodiesel it first purchases as the first biodiesel it uses to produce a biodiesel mixture.

(5) Effective date. This paragraph (h) of this section applies with respect to biodiesel sold or used by its producer after August 29, 2005, but taxpayers may rely on it as if it were applicable with respect to biodiesel sold or used by its producer on or before that date. In addition, the Internal Revenue Service may accept claims relating to biodiesel sold or used by its producer on or before August 29, 2005 if the claim evidences a good faith effort to comply with the applicable Code provision or the rules of Notice 2005-4 as in effect before August 29, 2005 and the Service can reasonably verify the amount of biodiesel and agri-biodiesel covered by the claim.

Section 3. DEFINITION OF A BIODIESEL MIXTURE

(a) Definition in the Code. Section 6426(c)(3) provides that biodiesel mixture means a mixture of biodiesel and diesel fuel (as defined in § 4083(a)(3)), determined without regard to any use of kerosene, that (1) is sold by the taxpayer producing the mixture to any person for use as a fuel, or (2) is used as a fuel by the taxpayer producing the mixture.

(b) Explanation of terms--(1) The diesel fuel in a biodiesel mixture may be either dyed or undyed. However, taxpayers are reminded of the penalty in § 6715 for the willful alteration of the strength or composition of any dye in dyed fuel. Also see § 48.6715-1 of the Manufacturers and Retailers Excise Tax Regulations.

(2) A biodiesel mixture generally is used as a fuel when it is consumed to produce energy. Thus, for example, a biodiesel mixture that is consumed in a furnace to produce heat is used as a fuel. However, the destruction of a biodiesel mixture in a

fire or other casualty loss is not treated as use as a fuel.

(3) A biodiesel mixture is a mixture of biodiesel and diesel fuel containing at least 0.1 percent (by volume) of diesel fuel. Thus, for example, a mixture of 999 gallons of biodiesel and 1 gallon of diesel fuel is a biodiesel mixture.

(4) Kerosene in a mixture of biodiesel and diesel fuel is not included in the volume for purposes of determining whether the biodiesel mixture satisfies the volume requirements set forth in paragraph (b)(3) of this section. Further, the gallons of kerosene in the mixture of biodiesel and diesel fuel are not included in the gallons of biodiesel for which a credit or payment is allowed.

(c) Effective date--(1) In general. Paragraphs (b)(1), (2), and (4) of this section are applicable January 1, 2005, the effective date of Notice 2005-4. Paragraph (b)(3) of this section applies with respect to mixtures produced after August 29, 2005 and, except as provided in paragraph (c)(2) of this section, is not taken into account in determining the tax treatment of any mixture produced on or before that date.

(2) Reliance permitted in certain cases. A taxpayer may rely on paragraph (b)(3) of this section to claim a biodiesel mixture credit for a mixture produced on or before August 29, 2005 if the taxpayer has not taken any action inconsistent with the claim requirements under this notice such as providing a Certificate for Biodiesel or a Statement of Biodiesel Reseller with respect to the biodiesel in the mixture.

Section 4. DEFINITION OF AGRI-BIODIESEL

(a) In general. Section 40A(d)(2) defines agri-biodiesel as meaning biodiesel derived solely from virgin oils, "including" esters derived from virgin vegetable oils from

corn, soybeans, sunflower seeds, cottonseeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, and mustard seeds, and from animal fats. The language “including” indicates that this list is not exclusive. Thus, for example, biodiesel derived solely from virgin oils includes esters derived from palm oil and fish oil.

(b) Commingled feedstock. If virgin oils and recycled oils are commingled for use as a feedstock in the production of biodiesel, the biodiesel is not derived solely from virgin oils as required by § 40A(d)(2).

(c) Effective date. Paragraph (a) of this section is applicable January 1, 2005, the effective date of Notice 2005-4. Paragraph (b) of this section applies with respect to biodiesel produced after August 29, 2005.

Section 5. CLAIMS FOR PAYMENTS THAT EXCEED THE ALLOWABLE CREDIT

(a) Background. Section 6426 generally allows a biodiesel mixture credit against any tax imposed by § 4081, including those taxes unrelated to biodiesel mixtures or alcohol mixtures. The § 6426 credit is claimed on a Form 720, Quarterly Federal Excise Tax Return, which is filed at the end of each quarter. Section 6427(e)(1) generally allows a payment relating to a person’s production of a biodiesel mixture. The § 6427(e)(1) payment may be claimed before Form 720 is due and as often as once a week if certain conditions are met. However, § 6427(e)(2) provides that no amount is payable under § 6427(e)(1) for any mixture with respect to which an amount is allowed as a credit under § 6426. If a claim is made under § 6427(e) for an amount that is allowable as a credit under § 6426, section 2(d)(2) of Notice 2005-4 provides that payment under § 6427(e) is treated as an excessive amount under § 6206. Unless this

excessive amount is repaid with interest before the due date of the Form 720 on which the credit under § 6426 is allowable, it may be assessed as if it were a tax imposed by § 4081 and a penalty under § 6675 may be imposed.

(b) Computation of payment limitation. A person producing biodiesel mixtures outside the bulk transfer/terminal system and liable for tax imposed by § 4081 solely because of the removal or sale of the mixtures can avoid making excessive claims for payment under § 6427(e) by limiting claims filed on a form other than Form 720 to--

(1) 75.6 percent of the total credits and payments allowable with respect to agri-biodiesel used to produce the mixtures (24.4 percent of the allowable credits and payments must be claimed on Form 720); and

(2) 51.2 percent of the total credits and payments allowable with respect to biodiesel other than agri-biodiesel used to produce the mixtures (48.8 percent of the allowable credits and payment must be claimed on Form 720).

(c) Example. The following example illustrates the application of this section:

(1) P is a biodiesel mixture producer. P produces blended taxable fuel outside of the bulk transfer/terminal system by adding biodiesel to taxed diesel fuel. See §§ 48.4081-1(c)(1) and 48.4081-3(g). P has no § 4081 liability other than its liability as a blender on its sale of the biodiesel mixture. During the period August 1 through August 10, 2005, P uses 5,000 gallons of agri-biodiesel to produce a biodiesel mixture. The total of the credits and payments allowable with respect to the biodiesel used to produce the mixture is \$5,000 (5,000 x \$1.00).

(2) On August 11, P files Form 8849, Claim for Refund of Excise Taxes, for the period August 1 - August 10. To avoid an excessive claim, P limits the claim on Form 8849 to \$3,780 (75.6 percent of \$5,000) reporting 3,780 gallons of agri-biodiesel.

(3) On Form 720, Quarterly Federal Excise Tax Return, P reports liability for IRS No. 60(c) of \$1,220 (5,000 gallons X \$.244) and claims a credit on Schedule C for \$1,220 (24.4 percent of \$5,000) for the period August 1 – August 10, reporting on Schedule C 1,220 gallons of agri-biodiesel.

(d) Effective date. This section is applicable January 1, 2005, the effective date of Notice 2005-4.

Section 6. AVIATION-GRADE KEROSENE

(a) In general--(1) Section 4 of Notice 2005-4 provides guidance on the taxation of aviation-grade kerosene under the Act. Under sections 4(d) and 4(e), a position holder is not liable for tax if, among other conditions, it obtains a certificate from the operator of the aircraft into which the aviation-grade kerosene is delivered. This certificate, described in section 4(g), is signed by the aircraft operator and includes the name of the position holder.

(2) In a so-called "flash title transaction," the position holder sells (as defined in § 48.0-2(a)(5)) the aviation-grade kerosene to a wholesale distributor (reseller) that in turn sells the kerosene to the aircraft operator as the kerosene is being removed from a terminal into the fuel tank of an aircraft.

(3) For purposes of determining whether the conditions of sections 4(d)(1)(ii) and 4(e)(2) of Notice 2005-4 are met in a case described in paragraph (a)(2) of this section, the position holder will be treated as having a certificate (in the form described in section 4(g)) from the operator of the aircraft if: (i) the aircraft operator puts the reseller's name, address, and employer identification number on the certificate in place of the position holder's name, address, and employer identification number; and (ii) the reseller provides the position holder with a statement of aviation-grade kerosene reseller. The reseller statement is a statement that is signed under penalties of perjury by a person with authority to bind the reseller; is provided at the bottom or on the back

of the certificate (or in an attached document); and contains the reseller's name, address, and employer identification number, the position holder's name, address, and employer identification number, and a statement that the reseller has no reason to believe that any information in the accompanying aircraft operator's certificate is false.

(b) Effective date. This section is applicable August 29, 2005.

Section 7. CORRECTION TO NOTICE 2005-4

The last sentence of section 2(a) of Notice 2005-4 is revised to read as follows: Under the Code's coordination rules, the sum of all credits and payments per gallon of alcohol or biodiesel may not exceed the credit rate per gallon prescribed in § 40 or 40A, whichever is applicable.

Section 8. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-1915.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are in the following sections.

Section 2 of the notice describes the statement that the biodiesel reseller must give to its buyer with respect to the biodiesel mixture credit or biodiesel credit.

Section 6 of the notice describes the statement that an aviation-grade kerosene reseller must give to the position holder of aviation grade kerosene.

The collections of information are required to obtain a tax benefit. This information will be used to substantiate claims for the tax benefits. The likely respondents are businesses, not-for-profit institutions, and state, local, or tribal governments.

The estimated total annual reporting and or recordkeeping burden is 5,100 hours.

The estimated average annual burden per respondent and/or recordkeeper is approximately is .25 hours.

The estimated number of respondents and recordkeepers is 240.

Books or records relating to a collection of information must be retained as long as their contents may become material to the administration of the internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

Section 9. EFFECT ON OTHER DOCUMENTS

Notice 2005-4 is modified as described in sections 2, 6, and 7 of this notice.

Section 10. DRAFTING INFORMATION

The principal authors of this notice are Susan Athy and Deborah Karet of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, please contact Ms. Athy (regarding biodiesel) or Ms. Karet (regarding aviation-grade kerosene) at (202) 622-3130 (not a toll-free call).